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9 LINKEDIN CORPORATION, THE BOARD OF
10 DIRECTORS OF LINKEDIN CORPORATION,
11 and THE 401(K) COMMITTEE

12
13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 *In re LinkedIn ERISA Litigation*

Case No: 5:20-cv-05704-EJD

16 **LINKEDIN'S NOTICE OF MOTION**
17 **AND MOTION TO STAY**
18 **PROCEEDINGS PENDING**
19 **DECISIONS BY THE SUPREME**
20 **COURT IN *HUGHES V.***
21 ***NORTHWESTERN UNIVERSITY* AND**
22 **THE NINTH CIRCUIT IN *KONG V.***
23 ***TRADER JOE'S CO.***

24 **MEMORANDUM OF POINTS AND**
25 **AUTHORITIES IN SUPPORT**

26 Date: May 12, 2022

27 Time: 9:00 a.m.

28 Location: San Jose Courthouse

Courtroom 4

280 South 1st Street

San Jose, CA 95113

Complaint Filed: August 14, 2020

FAC Filed: November 4, 2020

SAC Filed: December 16, 2021

Hon. Judge Edward J. Davila

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 12, 2022, at 9:00 a.m., or as soon thereafter as this matter may be heard before the Honorable Edward J. Davila in Courtroom 4 of the above-entitled Court, located at 280 South 1st Street, San Jose, CA 95113, LinkedIn Corporation, the Board of Directors of LinkedIn Corporation, and the 401(k) Committee (“Committee”) (collectively, “LinkedIn”) will and hereby do move the Court to stay proceedings pending decisions by the Supreme Court in *Divane v. Northwestern Univ.*, 953 F. 3d 980 (7th Cir. 2020), *cert. granted sub nom. Hughes v. Northwestern University*, 141 S. Ct. 2882 (U.S. 2021) and the Ninth Circuit in *Kong v. Trader Joe’s Co.*, No. 20-05790, 2020 WL 7062395 (C.D. Cal. Nov. 30, 2020), *appeal filed*, No. 20-56415 (9th Cir. Dec. 30, 2020). In each of these cases, the court will be asked to determine whether the same type of ERISA breach of fiduciary duty allegations made here state a plausible claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Oral argument in *Northwestern* took place on December 6, 2021. Oral argument in *Trader Joe’s* has been held in abeyance by the Ninth Circuit pending the outcome of *Northwestern*.

As explained herein, a stay is proper because it will simplify the issues and promote judicial economy. In fact, the decisions in *Northwestern* and *Trader Joe’s* may be highly instructive, if not wholly dispositive, as to the claims asserted in Plaintiffs’ Second Amended Complaint here. Staying the litigation pending these rulings will ensure consistency with forthcoming Supreme Court and Ninth Circuit guidance that will clarify whether Plaintiffs’ claims as currently pled suffice to state plausible claims for relief. Such a stay would lessen the burdens of litigation on both parties and the Court and would be limited in duration, given that the Supreme Court will rule on *Northwestern* during its upcoming term and the Ninth Circuit will rule shortly thereafter. Moreover, because the LinkedIn Plan that is the subject of Plaintiffs’ claims no longer exists, there is not even any potential ongoing harm or prejudice from a stay.

LinkedIn bases its motion to stay on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, and such other materials and evidence as may be presented to the Court.

1 Dated: December 27, 2021

MORGAN, LEWIS & BOCKIUS LLP

By /s/ Sean K. McMahan

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MEMORANDUM OF POINTS AND AUTHORITY

I. STATEMENT OF ISSUES TO BE DECIDED

Whether LinkedIn has demonstrated good cause necessary to stay proceedings pending the outcome of the Supreme Court’s decision in *Northwestern*¹ and the Ninth Circuit’s decision in *Trader Joe’s*.²

II. INTRODUCTION

This Court recently held that it lacked subject matter jurisdiction over the claims in Plaintiffs’ First Amended Complaint because Plaintiffs did not allege facts to satisfy the requirements of Article III standing. (Dkt. 96). Plaintiffs have now filed a Second Amended Complaint (“Complaint”) that purports to vest this Court with subject matter jurisdiction, satisfy the requirements of Article III, and allege ERISA fiduciary breach claims regarding the Plan’s offering of the Fidelity Freedom Target Date Funds (the “Freedom TDFs”). (Dkt. 99). The Rule 12(b)(6) pleading standards for alleging such fiduciary breach claims is currently being considered by the Supreme Court in *Northwestern* (oral argument held December 6) and the Ninth Circuit in *Trader Joe’s*. Accordingly, defendants LinkedIn Corporation, the Board of Directors of LinkedIn Corporation, and the 401(k) Committee (“Committee”) (collectively, “LinkedIn”) respectfully seek a stay of all proceedings in this case pending decisions by the Supreme Court in *Northwestern* and the Ninth Circuit in *Trader Joe’s*.

More specifically, in *Northwestern*, the plaintiffs allege that defendants breached their fiduciary duties under ERISA, in part, by retaining allegedly expensive and underperforming actively managed funds instead of cheaper and better performing passively managed funds. *See*,

¹ *Divane v. Nw. Univ.*, 953 F. 3d 980 (7th Cir. 2020), *cert. granted sub nom. Hughes v. Nw. Univ.*, 141 S. Ct. 2882 (U.S. 2021). Plaintiff Divane was a plaintiff in the district court proceedings and an appellant in the court of appeals but is not participating in the proceedings before the Supreme Court. *See* Pet. Br., 2021 WL 4121358, at *ii.

² *Kong v. Trader Joe’s Co.*, No. 20-05790, 2020 WL 7062395 (C.D. Cal. Nov. 30, 2020), *appeal filed*, No. 20-56415 (9th Cir. Dec. 30, 2020).

1 e.g., Petitioners’ Brief, *Hughes v. Nw. Univ.*, 141 S. Ct. 2882 (2021) No. 19-1401, 2021 WL
 2 4121358, at *36 n.15 (hereinafter “Pet. Br.”) (“The Plans included actively managed options with
 3 expense ratios of 10 or even 20 times higher than passively managed index funds in the same
 4 investment style. Some of those options consistently underperformed benchmark indices or
 5 comparable lower-cost alternatives.”) (internal citations omitted). In *Trader Joe’s*, the plaintiffs
 6 allege that defendants breached their fiduciary duties under ERISA by, among other things,
 7 causing the retirement plan to offer allegedly riskier and more expensive actively managed funds
 8 instead of purportedly “prudent” cheaper passively managed alternatives. In other words, both of
 9 these cases deal with the *same types of claims* that Plaintiffs allege here.

10 Under these circumstances, the Supreme Court’s decision in *Northwestern* and the Ninth
 11 Circuit’s decision in *Trader Joe’s* (held in abeyance by the Ninth Circuit pending the outcome of
 12 *Northwestern*) will be highly instructive, if not entirely dispose of the claims asserted in Plaintiffs’
 13 Complaint. Regardless of the outcome in *Northwestern*, the Supreme Court will provide much
 14 needed clarity on the pleading standard applicable to ERISA breach of fiduciary duty claims like
 15 those Plaintiffs allege here. The Ninth Circuit’s analysis in *Trader Joe’s*, applying the law of
 16 *Northwestern*, will establish the law of this Circuit and bear directly on whether Plaintiffs plausibly
 17 allege LinkedIn’s fiduciary process was flawed because the Plan offered one set of actively
 18 managed target date funds instead of purportedly better performing passively managed ones. This
 19 is the exact guidance this Court indicated was lacking. *In re LinkedIn ERISA Litig.*, No. 5:20-cv-
 20 05704, 2021 WL 5331448, at *7 (N.D. Cal. Nov. 16, 2021). Staying this litigation until the
 21 Supreme Court and Ninth Circuit rule in *Northwestern* and *Trader Joe’s* will ensure consistency
 22 with pending guidance that will clarify whether Plaintiffs’ claims in the Complaint state plausible
 23 claims for relief. A stay will also obviate the need for supplemental rounds of briefing on
 24 LinkedIn’s anticipated motion to dismiss, or a renewed motion once the *Northwestern* and/or
 25 *Trader Joe’s* decisions issue. For these reasons, many courts have recently stayed proceedings in
 26 ERISA cases pending the Supreme Court’s decision in *Northwestern*, including the Ninth Circuit
 27 in *Trader Joe’s*. See, e.g., *Kong v. Trader Joe’s Co.*, No. 20-56415, BL-47 (9th Cir. Oct. 6, 2021);
 28 *Brown v. The MITRE Corp.*, No. 1:21-cv-11605, Dkt. 21 (D. Mass. Nov. 19, 2021); *Coviello v.*

BHS Mgmt. Servs., Inc., No. 3:20-30198, Dkt. 68 (D. Mass. Oct. 15, 2021); *Hundley v. Henry Ford Health Sys.*, No. 21-11023, 2021 WL 4775356 (E.D. Mich. Oct. 13, 2021); *O'Driscoll v. Plexus Corp.*, No. 1:20-01065, Dkt. 32, at *1-2 (E.D. Wis. Sept. 30, 2021); *Kennedy v. Aegis Media Americas, Inc.*, No. 1:20-cv-3624, 2021 WL 4077946, at *1 (S.D.N.Y. Sept. 7, 2021). This Court should do the same. There is good cause for the requested stay and, because the Plan at issue in this case no longer exists, no potential ongoing harm or prejudice would result from its imposition. On the contrary, a stay would promote the “economy of time and effort for [the court], for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Clinton v. Jones*, 520 U.S. 681, 706 (1997).

III. SUMMARY OF PLAINTIFFS’ CLAIMS AND STATUS OF THE LITIGATION

Plaintiffs bring three claims on behalf of a proposed class of participants and beneficiaries in the LinkedIn Corporation 401(k) Profit Sharing Plan and Trust (the “Plan”). First, Plaintiffs allege LinkedIn breached its fiduciary duties of loyalty and prudence under ERISA Section 404(a), 29 U.S.C. § 1104(a) by offering the allegedly “high-cost” and “excessively risky” actively managed Freedom TDFs over the passively managed alternative Fidelity Freedom Index Target Date Funds (the “Index TDFs”). (Compl. ¶¶ 25-40). Second, Plaintiffs allege LinkedIn failed to monitor the Committee in carrying out its fiduciary duties.³ (*Id.* ¶¶ 67-75). Third, Plaintiffs allege, in the alternative and to the extent that any defendant is not deemed a fiduciary or co-fiduciary under ERISA, a knowing breach of trust. (*Id.* ¶¶ 76-78).

Plaintiffs filed their original complaint on August 14, 2020 and, with LinkedIn’s consent, a First Amended Complaint (“FAC”) on November 4, 2020. LinkedIn moved to dismiss the FAC on January 4, 2021.⁴ This Court ruled on that motion on November 16, 2021, dismissing Plaintiffs’

³ The plaintiffs in *Northwestern* alleged the same claim for “fail[ure] to monitor” other fiduciaries. Pet. Br., 2021 WL 4121358, at *12 n.5. Because the failure to monitor claim is derivative of the underlying fiduciary breach claim, the Supreme Court’s decision in *Northwestern* will also be instructive on this claim.

⁴ At the time LinkedIn filed its Motion to Dismiss the First Amended Complaint, the Supreme Court

FAC for lack of subject matter jurisdiction and granting leave to amend. On December 16, 2021, Plaintiffs filed their operative Complaint. By stipulation of the parties, LinkedIn's response to the Complaint is currently due January 20, 2021. LinkedIn is filing an administrative motion seeking a stay of the responsive pleading deadlines concurrently with this motion, seeking to avoid wasting party and judicial resources on briefing a motion to dismiss that may ultimately be rendered moot.

IV. LEGAL STANDARD

"A district court has inherent power to control the disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, for counsel, and for litigants." *CMAX, Inc. v. Hall*, 300 F. 2d 265, 268 (9th Cir. 1962) (citing *Landis*, 299 U.S. at 254-55). This includes the "inherent power to stay its proceedings." *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997) (citing *Landis*, 299 U.S. at 254). To determine the suitability of such a stay, courts consider:

- (1) the possible damage which may result from granting of a stay;
- (2) the hardship or inequity which a party may suffer in being required to go forward; and
- (3) the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

Bankwitz v. Ecolab, Inc., No. 17-cv-02924, 2017 WL 4642284, at *4 (N.D. Cal. Oct. 17, 2017) (quoting *CMAX*, 300 F. 2d at 268). All factors weigh in favor of a stay here. Where, as here, the *CMAX* factors weigh in favor of a stay, courts routinely find that the "good cause" requirement for modifying a schedule under Fed. R. Civ. P. 16(b)(4) is met. *See, e.g., Sealy v. Chase Bank (U.S.A.), N.A.*, No. 19-cv-07710, 2020 WL 5814108, at *1-2 (N.D. Cal. Sept. 29, 2020) (applying the *CMAX* factors and finding good cause to grant a stay); *Ahmed v. Comenity Bank*, No. 8:20-cv-00453, 2021 WL 3524124, at *1-2 (C.D. Cal. Jan. 29, 2021) (same).

had not granted certiorari in *Northwestern* and appellate briefing in the *Trader Joe's* case had not commenced.

V. **ARGUMENT**

A. **The Supreme Court’s Decision in *Northwestern* and the Ninth Circuit’s Decision in *Trader Joe’s* Will Simplify Issues and Promote the Orderly Course of Justice**

In determining whether this factor weighs in favor of a stay, “considerations of judicial economy are highly relevant.” *Gustavson v. Mars, Inc.*, No. 13-cv-04537, 2014 WL 6986421, at *3 (N.D. Cal. Dec. 10, 2014). As a general principle, courts have consistently held that staying litigation is appropriate where the Supreme Court or Circuit Court’s decision on an issue may have a dispositive effect on the case.⁵ That is precisely the circumstance here. The Supreme Court’s decision in *Northwestern* will clarify whether virtually identical allegations and claims suffice to state a claim for relief. Specifically, in *Northwestern*, the Supreme Court will resolve:

[w]hether allegations that a defined-contribution retirement plan paid or charged its

⁵ See, e.g., *Gustavson*, 2014 WL 6986421 at *3 (granting defendant’s motion to stay pending resolution of *Jones v. ConAgra Foods, Inc.*, No. 14-16327, by the Ninth Circuit where “the Ninth Circuit’s decision is likely to provide substantial guidance, if not new law, that will materially impact the Court’s decisions in the instant case”); *Matera v. Google Inc.*, No. 15-CV-04062, 2016 WL 454130, at *2-3 (N.D. Cal. Feb. 5, 2016) (granting defendant’s motion to stay pending resolution of *Robins v. Spokeo*, No. 13-1339, by the Supreme Court where “*Spokeo* may provide substantial guidance as to what statutory violations (if any) confer Article III standing”); *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 622 (S.D.N.Y. 2012) (granting stay pending Supreme Court decision that would likely “sett[e] an important issue of law bearing on the action”); *Homa v. Am. Express Co.*, No. 06-2985, 2010 WL 4116481, at *3, *9 (D.N.J. Oct. 18, 2010) (granting defendants’ motion to stay pending resolution of *AT & T Mobility LLC v. Concepcion*, No. 09-893, by the Supreme Court where “the Supreme Court’s decision in *Concepcion* may substantially affect or be dispositive of the issues in this case”); *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 171 (D.D.C. 2008) (noting that the court had ordered a four-month stay while the Supreme Court heard and decided an “issue [] of considerable significance” in unrelated case); *Michael v. Ghee*, 325 F. Supp. 2d 829, 831 (N.D. Ohio 2004) (granting stay where “the case on appeal to the Supreme Court may have a dispositive effect on the instant case”).

participants fees that substantially exceeded fees for alternative available investment products or services are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under ERISA, 29 U.S.C. § 1104(a)(1)(B).

Pet. Br., 2021 WL 4121358, at *1. As part of their claims, the plaintiffs in *Northwestern* argued that the plans at issue in that case “included actively managed options with expense ratios of 10 or even 20 times higher than passively managed index funds in the same investment style. Some of those options consistently underperformed benchmark indices or comparable lower-cost alternatives.” *Id.* at *36 n. 15 (citations omitted). *See also Divane v. Northwestern Univ.*, No. 1:16-cv-08157 (N.D. Ill.) (Amended Complaint, Dkt. 38 ¶¶ 176, 200-01, 211-12) (identifying specific actively managed funds that were allegedly imprudent because of supposedly cheaper comparable passively managed funds).

In *Trader Joe’s*, the Ninth Circuit will address whether plaintiffs’ allegations in a complaint of “various comparisons of the failure of mutual funds to outperform their less-expensive index counterparts” provides a meaningful benchmark to state a breach of fiduciary duty claim. Pls. Appellants’ Brief, *Kong v. Trader Joe’s Co.*, No. 20-56415 2021 WL 1377339, at *44 (9th Cir. Dec. 30, 2020). Here, like in *Northwestern* and *Trader Joe’s*, Plaintiffs allege that they were participants in a defined-contribution retirement plan and assert LinkedIn breached its fiduciary duties of prudence based on the inclusion of allegedly expensive and underperforming actively managed investment options instead of cheaper passive funds. Thus, the issues in *Northwestern* and *Trader Joe’s*—whether allegations that those respective plans should have offered allegedly lower-cost, better performing passively managed funds, and particularly whether allegations comparing actively-managed funds to passively managed alternatives, suffice to state a claim for relief under Rule 12(b)(6)—are the *same* issues that LinkedIn will present in its forthcoming motion to dismiss.

In similar circumstances, courts recently stayed proceedings pending the Supreme Court’s forthcoming decision in *Northwestern*. Perhaps most notably, the Ninth Circuit in *Trader Joe’s* stayed that case, holding “in abeyance” the oral argument “pending the Supreme Court’s resolution of *Hughes v. Northwestern University*.” *Trader Joe’s*, No. 20-56415, BL-47. Other courts have

1 followed suit. In the past two months, the United States District Court for the District of
 2 Massachusetts granted stays of all proceedings in two similar ERISA fees cases also brought by
 3 Capozzi Adler, finding that “the interests of judicial and litigant economy outweigh the degree of
 4 potential harm to the Plaintiffs in granting the stay.” *Coviello v. BHS Mgmt. Servs., Inc.*, No. 3:20-
 5 30198, Dkt. 68; *see also Brown v. The MITRE Corp.*, No. 1:21-cv-11605, Dkt. 21. The court
 6 reasoned that *Northwestern* “will likely be dispositive as to part of Defendants’ pending motion
 7 and affect discovery, briefing of the pending motion, and possible amendment of the pleadings,”
 8 *Coviello*, No. 3:20-30198, Dkt. 68, and that “[w]here the alleged harm affects a putative class of
 9 claimants, it is in their collective interest, as well as that of defendants, that the case be efficiently,
 10 economically, and correctly decided.” *Brown*, No. 1:21-cv-11605, Dkt. 21. For the same reasons,
 11 a court in the Eastern District of Wisconsin recently stayed a half dozen nearly identical actions.⁶

12 In *Kennedy*, a court in the Southern District of New York stayed all proceedings over the
 13 objection of some of the same plaintiffs’ lawyers as here, even though the defendants had already
 14 moved to dismiss the complaint. *Kennedy*, 2021 WL 4077946, at *1-2. The court similarly
 15 reasoned that *Northwestern* “will settle a key issue that has direct bearing on Defendants’ motion
 16 to dismiss” and further found that the interests of the parties and the court weighed in favor of a
 17 stay, with no significant prejudice to plaintiffs. *Id.* at *2-3.

18 The Eastern District of Michigan in *Hundley* also recently granted a stay of all proceedings

19
 20 ⁶ *See, e.g., O’Driscoll*, No. 1:20-01065, Dkt. 32, at *1-2 (staying case *sua sponte* with motion to
 21 dismiss pending because *Northwestern* “will likely clarify the pleading requirements for ERISA
 22 breach of fiduciary duty claims” and “[a]waiting clarification by the Supreme Court will not only
 23 save judicial resources but will also likely preserve the parties’ resources by allowing them to
 24 avoid unnecessary discovery or appeal”); *Glick v. ThedaCare Inc.*, No. 1:20-01236, Dkt. 26, at *1-
 25 2 (E.D. Wis. Sept. 30, 2021) (same); *Guyes v. Nestle USA Inc.*, 1:20-01560, Dkt. 21, at *1-2 (E.D.
 26 Wis. Sept. 30, 2021) (same); *Nohara v. Prevea Clinic, Inc.*, No. 1:20-01079, Dkt. 43, at *1-2 (E.D.
 27 Wis. Sept. 30, 2021) (same); *Soulek v. Costco Wholesale Corp.*, No. 1:20-00937, Dkt. 41, at *1-2
 28 (E.D. Wis. Sept. 30, 2021) (same); *Cotter v. Matthews Int’l Corp.*, No. 1:20-01054, Dkt. 34, at *1-
 2 (E.D. Wis. Sept. 30, 2021) (same).

1 in a similar ERISA fees case where, like here, the defendants were soon to file a motion to dismiss,
 2 reasoning that “regardless of the outcome in the Supreme Court, the decision to be issued in
 3 [Northwestern] will provide the pleading standard that this Court must follow in deciding the
 4 motion to dismiss.” *Hundley*, 2021 WL 4775356, at *3. The court concluded, “[t]he potential
 5 dispositive effect of the other case weighs in favor of a stay, as the Supreme Court’s decision in
 6 [Northwestern] will settle a key issue that has direct bearing on whether this action may proceed.”
 7 *Id.*

8 The same is true here. Considering the similarity of the claims at issue, the Supreme
 9 Court’s analysis in *Northwestern* will bear on whether Plaintiffs here have pled viable claims
 10 under ERISA. Indeed, if the Supreme Court adopts the Seventh Circuit’s reasoning, the
 11 *Northwestern* decision will entirely dispose of Plaintiffs’ claims. Even if the Supreme Court
 12 rejects the Seventh Circuit’s reasoning, the Ninth Circuit’s analysis in *Trader Joe’s*, applying the
 13 law of *Northwestern*, will establish the law of this Circuit and bear on whether Plaintiffs have pled
 14 viable claims under ERISA, particularly with respect to the active vs. passive issue core to both
 15 this case and *Trader Joe’s*. Thus, good cause for the requested stay exists.

16 Moreover, a stay will promote judicial economy because moving forward with the
 17 proceedings before the Supreme Court and Ninth Circuit’s rulings will result in unnecessary
 18 burdens on *both* the parties and the Court. *See, e.g., Kennedy*, 2021 WL 4077946, at *1 (“The
 19 Court’s decision in [Northwestern] will clarify a critical issue currently before the Court, and in
 20 doing so, promote the public and judicial interest in the efficient conduct of litigation.” (internal
 21 quotation marks and citation omitted)); *Coviello*, No. 3:20-30198, Dkt. 68 (same); *O’Driscoll*, No.
 22 1:20-01065, Dkt. 32, at *1-2 (staying case pending *Northwestern* decision “will also likely
 23 preserve the parties’ resources by allowing them to avoid unnecessary discovery or appeal”).
 24 Absent a stay, if the parties were required to brief a motion to dismiss now, LinkedIn would rely
 25 on, among other things, the Seventh Circuit’s decision in *Northwestern*, the Ninth Circuit’s
 26 decision affirming *White v. Chevron Corp.*, No. 16-0793, 2017 WL 2352137 (N.D. Cal. May 31,
 27 2017), *aff’d*, 752 F. App’x 453 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2646 (2019), and various
 28 district court rulings that follow those decisions. In opposition, Plaintiffs are likely to rely on

contrary district court rulings. The forthcoming decisions in *Northwestern* and *Trader Joe's* may effectively affirm, overrule, or modify much of this case law. The decisions in *Northwestern* and *Trader Joe's* will inform how the parties argue the upcoming motion to dismiss and the prevailing standards that this Court will apply in assessing those arguments, and therefore a stay pending the outcome of these decisions would promote the “public and judicial interest in the efficient conduct of litigation.” *Kennedy*, 2021 WL 4077946, at *1.

B. A Stay Will Not Prejudice Plaintiffs Because The Plan No Longer Exists and the Duration of The Stay Will be Relatively Short.

Any possible damage that a stay of proceedings would cause Plaintiffs is minimal for two reasons. First, the Plan at issue no longer exists. As such, neither Plaintiffs nor any putative class members currently are invested in any of the challenged investment options in the Plan or paying any of the challenged recordkeeping fees. Thus, there is no possibility of any ongoing harm or prejudice. *See also Brown v. The MITRE Corp.*, No. 1:21-cv-11605, Dkt. 21 (granting a stay pending the outcome of *Northwestern* and rejecting plaintiffs’ assertion of harm, stating that “[w]here the alleged harm affects a putative class of claimants, it is in their collective interest, as well as that of defendants, that the case be efficiently, economically, and correctly decided”).

Second, the requested stay is of limited duration, particularly considering that the Supreme Court already heard oral argument in *Northwestern* and the *Trader Joe's* appeal is fully briefed. *See, e.g., Bankwitz*, 2017 WL 4642284, at *5 (“The forthcoming Supreme Court ruling [] minimizes the potential damage because the stay would be short and not indefinite.”); *Fuller v. Amerigas Propane, Inc.*, Nos. C 09-2493, 09-2616, 2009 WL 2390358, at *1 (N.D. Cal. Aug. 3, 2009) (granting a stay where the pending matter was expected to be heard within a few months and finding that any continued harm during the stay “is a harm that has a simple monetary remedy should a court eventually enter judgment for the Plaintiffs”). The requested stay will be limited in duration because the Supreme Court will rule on *Northwestern* in its upcoming term. Similarly, briefing in *Trader Joe's* was completed on July 21, 2021, so the Ninth Circuit is likely to hear oral argument shortly after the Supreme Court decides *Northwestern*.

The brief stay contemplated here is reasonable in duration, especially considering that (1)

1 Plaintiffs' First Amended Complaint was dismissed for lack of subject matter jurisdiction; and (2)
 2 Plaintiffs filed their current Complaint on December 16, 2021. Courts routinely grant stays where,
 3 like here, the decision that will inform next steps is expected to be decided within a year.⁷ *See*,
 4 *e.g.*, *McElrath v. Uber Technologies, Inc.*, No. 16-cv-07241, 2017 WL 1175591, at *5 (N.D. Cal.
 5 Mar. 30, 2017) (granting a stay where the Supreme Court decision was "likely [to] be issued
 6 within a year per the Supreme Court's customary practice after granting certification of a
 7 petition"); *Wolf v. Lyft, Inc.*, No. C 15-01441, 2015 WL 4455965, at *3 (N.D. Cal. July 20, 2015)
 8 (granting stay where decision was expected in eleven months); *Coviello*, No. 3:20-30198, Dkt. 68
 9 (staying case pending *Northwestern* decision, which could be issued eight months later, and where
 10 parties had already briefed motion to dismiss); *Alves v. Prospect Mortg., LLC*, No. 13-10985, 2013
 11 WL 5755465, at *3 (D. Mass. Oct. 22, 2013) ("Plaintiffs will suffer little prejudice if a four-to-six-
 12 month stay is imposed," even where they had already waited three years for a judicial
 13 determination in the case).⁸ Indeed, as explained above, several courts already have stayed other

14
 15 ⁷ In fact, some courts have granted motions to stay proceedings where the anticipated length of the
 16 stay was undisputedly "for an uncertain and significant period of time, lasting potentially a year or
 17 more" reasoning that any anticipated delay was "not excessive considering the likelihood that the
 18 Third Circuit's decision will resolve the dispositive . . . issues presently in dispute." *See Nicolas v.*
 19 *Trs. of Princeton Univ.*, No. 17-3695, 2017 WL 6514662, at *4 (D.N.J. Dec. 20, 2017) (citing *Bais*
 20 *Yaakov of Spring Valley v. Peterson's Nelnnet, LLC*, No. 11-0011, 2011 WL 4056318, at *2 (D.N.J.
 21 Sept. 12, 2011)) (internal quotation marks omitted). *See also Stryker Trauma S.A. v. Synthes*
 22 *(USA)*, No. 01-3879, 2008 WL 877848, at *4 (D.N.J. Mar. 28, 2008) (noting delay is not a
 23 dispositive issue as it is common to all stayed cases and finding that a lengthy stay outweighed the
 24 cost of not staying the case because otherwise the case would proceed "under the shadow of a
 pending" reexamination of the relevant issues.).

25 ⁸ *See also, e.g., Compressor Eng'g Corp. v. Thomas*, No. 10-10059, 2016 WL 438963, at *6 (E.D.
 26 Mich. Feb. 3, 2016) (granting stay pending forthcoming Supreme Court ruling, finding it was "not
 27 likely to prejudice or harm Plaintiff, the putative class, or the public" because the decision "should
 28 be forthcoming before the end of the Supreme Court's current term"); *Schartel v. OneSource*

1 401(k) fiduciary breach putative class actions pending the outcome of the Supreme Court's
 2 decision in *Northwestern*. See *supra* at 2-3, 6-8.

3 This makes sense because, as the *Hundley* court noted, motions to dismiss in ERISA class
 4 actions “typically take up the better part of a year.” 2021 WL 4775356, at *3-4. As a result,
 5 “Plaintiffs will not suffer significant prejudice because of a limited stay.” *Id.* In fact, it seems
 6 likely the length of the stay will be relatively short given that the *Northwestern* decision is
 7 expected before the end of the current Supreme Court term and briefing was completed in *Trader*
 8 *Joe’s* prior to its being held in abeyance pending the outcome of *Northwestern*.

9 Plaintiffs are likely to argue that a stay will prejudice them because the passage of time
 10 might result in a loss of evidence or because it will delay class members’ recovery. Not so. Courts
 11 consistently recognize that such vague assertions of prejudice, particularly in situations of limited
 12 delay such as this, are insufficient grounds to deny a stay. See, e.g., *Trim v. Mavenn, Inc.*, No. 20-
 13 cv-03917, 2020 WL 6460543, at *3 (N.D. Cal. Nov. 3, 2020) (“Trim’s concern that the requested
 14 stay will result in a loss of evidence is, in the absence of supporting facts, no more than
 15 speculation, particularly given the likely short duration of the stay.”); *Grundstrom v. Wilco Life*
 16 *Ins. Co.*, No. 20-cv-03445, 2020 WL 6873645, at *2 (N.D. Cal. Oct. 13, 2020) (“[Plaintiff’s]
 17 concern that the requested stay will make it more difficult to reach class members or preserve
 18 evidence is, in the absence of supporting facts, no more than speculation.”); *Ludlow v. Flowers*
 19 *Foods, Inc.*, No. 18-CV-1190, 2020 WL 773253, at *2 (S.D. Cal. Feb. 18, 2020) (citing *Lockyer v.*
 20 *Mirant Corp.*, 398 F. 3d 1098, 1110-12 (9th Cir. 2005) (“Mere delay in receiving damages is an
 21 insufficient basis to deny a stay.”). Plaintiffs likely will not suffer any harm should the Court stay
 22 this litigation, and in any event, any inconvenience to Plaintiffs is outweighed by the importance
 23 that decisions in *Northwestern* and *Trader Joe’s* could have on this litigation. This factor weighs
 24 in favor of a stay.

25 _____
 26 *Tech., LLC*, No. 1:15 CV 1434, 2015 WL 7430056, at *1-2 (N.D. Ohio Nov. 17, 2015) (finding
 27 “that the possible prejudice to plaintiff that will result from a stay is minimal as the Supreme
 28 Court[’s] . . . decisions will likely be rendered within the next seven months”).

1 **C. Denying a Stay Would Cause Substantial Hardship to LinkedIn**

2 Denying a stay also would cause substantial hardship. This case is still in the early stages,
 3 and the parties have not yet incurred extensive discovery expenses. Absent a stay, LinkedIn
 4 expects to move to dismiss the new Complaint. The Supreme Court in *Northwestern* and the Ninth
 5 Circuit in *Trader Joe's* are likely to squarely address the issue of whether a plaintiff can plausibly
 6 allege a fiduciary breach by comparing the fees and performance of actively managed funds to
 7 those of passively managed funds—a key issue that this Court has identified as lacking Ninth
 8 Circuit guidance. *LinkedIn*, 2021 WL 5331448, at *7 (“The Court is unaware of any Ninth Circuit
 9 decision endorsing the blanket rule LinkedIn suggests the Court apply here.”). If the motion to
 10 dismiss is still pending when the Supreme Court decides *Northwestern* and the Ninth Circuit
 11 decides *Trader Joe's*, the parties will no doubt seek to submit supplemental briefs on the impact of
 12 each of these cases on the parties’ motion to dismiss arguments. If LinkedIn’s motion is decided
 13 before the Supreme Court rules in *Northwestern*, there is a substantial likelihood one side or the
 14 other will seek reconsideration or appeal depending on the outcome in *Northwestern*. Similarly,
 15 there is a substantial likelihood one side or the other will seek reconsideration or appeal depending
 16 on the outcome in *Trader Joe's*. And that says nothing about the expensive and burdensome
 17 discovery Plaintiffs might seek in the interim, on claims that the Supreme Court or Ninth Circuit
 18 might well decide fail to state a claim as a matter of law. *See Pension Ben. Guar. Corp. v. Morgan*
 19 *Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013) (“[T]he prospect of discovery in a suit
 20 claiming breach of fiduciary duty is ominous, potentially exposing the ERISA fiduciary to probing
 21 and costly inquiries and document requests about its methods and knowledge at the relevant
 22 times.”).

23 Plaintiffs also may move to amend their Complaint yet again in light of the *Northwestern*
 24 and *Trader Joe's* decisions, which could prompt yet another motion to dismiss. LinkedIn should
 25 not be required to expend even more resources briefing a second (or third) motion to dismiss that
 26 may ultimately be rendered moot by the rulings in *Northwestern* and *Trader Joe's*. *See McElrath*,
 27 2017 WL 1175591, at *6 (granting a stay where “[w]ithout a stay, Defendant will be required to
 28 defend a large putative class action that may be rendered moot and unnecessary”).

1 The need for a stay is particularly pressing given the current Case Management Order,
 2 which provides that the deadline for Plaintiffs' motion for class certification is May 20, 2022 and
 3 the deadline for LinkedIn's opposition to class certification is July 1, 2022. (Dkt. 97.) If a stay is
 4 not granted, LinkedIn would be forced to expend significant resources including preparing for and
 5 defending the depositions of multiple defense and third-party witnesses, preparing affirmative
 6 and/or rebuttal expert reports regarding class certification, merits, and damages issues, followed by
 7 expert depositions. Especially in light of the fact that Plaintiffs have all of the core documents
 8 (and therefore substantially all relevant facts) pertinent to their claims, it would be patently unfair
 9 to require LinkedIn to expend significant resources defending this case when the forthcoming
 10 rulings in *Northwestern* and *Trader Joe's* will clarify the applicable pleading standard and may
 11 serve to highlight deficiencies in Plaintiffs' pleadings, or even wholly dispose of Plaintiffs' claims.
 12 Forcing LinkedIn to expend resources under these circumstances would impose substantial
 13 hardship. *See Gustavson*, 2014 WL 6986421, at *3 (granting a stay and finding the defendant
 14 would suffer significant hardship if required to prepare for class certification briefing that might
 15 ultimately be rendered unnecessary).

16 All told, without a stay, there is a risk the parties will have to adjust their factual allegations
 17 and legal theories and redo substantial briefing based on the outcomes in *Northwestern* and *Trader*
 18 *Joe's*. Indeed, there is little to be gained from moving forward with the parties briefing LinkedIn's
 19 forthcoming motion to dismiss and the Court deciding that motion at this juncture—and much to
 20 be lost. *See Hundley*, 2021 WL 4775356, at *4 (“[A]ny delay that might be avoided by denying
 21 the requested stay is far outweighed by the inequity and inefficiency in litigating issues that are
 22 going to be decided by the Supreme Court in *Hughes*.”). This all counsels in favor of staying the
 23 case.

24 **D. The Matters Above Were Not Far Enough Along to Warrant a Stay When**
 25 **LinkedIn Filed its Prior Motion to Dismiss**

26 At the time LinkedIn filed its prior motion to dismiss on January 4, 2021, the Supreme
 27 Court had not yet granted certiorari in *Northwestern* and briefing in *Trader Joe's* had not even
 28 begun. The Supreme Court did not grant certiorari until July 1, 2021, at which point LinkedIn's

1 motion to dismiss had been fully briefed and pending for nearly four months. *Northwestern*, 141
2 S. Ct. 2882. On appeal to the Ninth Circuit, *Trader Joe's* was initially scheduled for mediation.
3 *Trader Joe's*, No. 20-56415, Dkt. 5 (Jan. 13, 2021). The mediation was eventually cancelled and
4 briefing was not completed until July 19, 2021, at which point LinkedIn's motion to dismiss had
5 been fully briefed and pending for over four months. Thus, at the time LinkedIn first moved to
6 dismiss, it was uncertain whether there were any issues that would be decided in either
7 *Northwestern* or *Trader Joe's*, let alone the timing of such a decision. Now, however, we know
8 that decisions are at hand in both cases and each will address the same issues presented in our case.
9 Accordingly, a stay is appropriate.

10 **VI. CONCLUSION**

11 For all of the reasons described above, LinkedIn respectfully asks the Court to enter an
12 Order (1) staying these proceedings until the Supreme Court resolves *Northwestern* and the Ninth
13 Circuit resolves *Trader Joe's*; and (2) directing the parties to file a joint status report fourteen (14)
14 days after the Ninth Circuit issues a decision in *Trader Joe's* with a proposed deadline for
15 Plaintiffs to file an amended complaint or LinkedIn to respond to the Complaint.

1 Dated: December 27, 2021

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